

Washington Law Review

Volume 50 | Number 4

8-1-1975

Contracts—Modification Agreements: Need for New Consideration; Economic Duress—*Rosellini v. Banchero*, 83 Wn. 2d 268, 517 P.2d 955 (1974)

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Recommended Citation

Curtis L. Crocker, Recent Developments, *Contracts—Modification Agreements: Need for New Consideration; Economic Duress—Rosellini v. Banchero*, 83 Wn. 2d 268, 517 P.2d 955 (1974), 50 Wash. L. Rev. 960 (1975).

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CONTRACTS—MODIFICATION AGREEMENTS: NEED FOR NEW CONSIDERATION; ECONOMIC DURESS—*Rosellini v. Banchemo*, 83 Wn. 2d 268, 517 P.2d 955 (1974).

Plaintiff, a contractor, and defendant, a property owner, orally contracted for the construction of defendant's building. The work was to be done on a time and materials basis with a ceiling price of \$56,146, plus extras ordered by defendant and sales tax. Payments were to be made to plaintiff in installments¹ upon presentation of invoices for costs incurred. When construction was approximately 90 percent completed and the subcontractors were demanding payment from him, plaintiff submitted an invoice for \$16,720. Defendant at that point manifested a vague dissatisfaction with the "whole job," withheld payment and proposed a written modification agreement lowering the ceiling price to \$52,000. Immediately after plaintiff signed the modification agreement, defendant made complete payment of the invoice. Upon completion of the building, plaintiff claimed payment in accordance with the original contract. The parties were unable to agree on the balance due and plaintiff sought legal relief.

The trial court set aside the attempted modification of the ceiling price on grounds that it lacked consideration and was signed by plaintiff under duress. The Washington Court of Appeals reversed, finding that there was consideration in the settlement of a bona fide dispute² and that no duress or business compulsion forced the agreement. The Washington Supreme Court, however, reversed the court of appeals and refused to enforce the attempted modification. Finding no dispute between the parties, the court held that the modification was unsupported by new consideration.³ The court, apparently by simply

1. The installment payment scheme was an inferred feature of the oral contract as evidenced by the actions of the parties in the course of performance under the contract. Four invoices totalling \$28,413 had been presented and paid during July through September, 1969. *Rosellini v. Banchemo*, 8 Wn. App. 383, 385, 506 P.2d 866, 867 (1973).

2. The Court of Appeals apparently found that a bona fide dispute resulted from defendant's general dissatisfaction with the job. *Id.* at 384-85, 506 P.2d at 867-68.

3. The supreme court stated the finding of no bona fide dispute was implicit in the trial court's decision that the modification lacked consideration. *Rosellini v. Banchemo*, 83 Wn. 2d 268, 270, 517 P.2d 955, 957 (1974).

weighing cases⁴ without analyzing doctrine, resolved a conflict in Washington case law as to whether a contract modification must be supported by new consideration by overruling those decisions upholding modification without consideration. *Held*: A subsequent agreement modifying an existing contract must be supported by new, mutual consideration independent from the consideration involved in the original contract. The court did not reach the issue of economic duress. *Rosellini v. Banchemo*, 83 Wn. 2d 268, 517 P.2d 955 (1974).

This note does not quarrel with the result in *Rosellini*. It is submitted, however, that the court should have based its decision on the doctrine of economic duress rather than embrace the rule that new consideration is required to render a contract modification legally enforceable. This note will examine the strengths and weaknesses of a rule requiring mutual consideration where an existing contract is modified and conclude the rule is dysfunctional. The note will also explore the doctrine of economic duress in Washington and how it could have been applied to the facts in *Rosellini*.

4. The court borrowed the analysis of Professor Warren L. Shattuck who suggested that two irreconcilable lines of authority had developed in Washington case law on the issue of whether new consideration is necessary for a contract modification. Shattuck, *Contracts in Washington, 1937-57*, 34 WASH. L. REV. 24, 59-63 (1959). Shattuck urged the court to require that modification agreements meet the "usual consideration requirements." *Id.* at 63.

Although there are many Washington cases holding that new consideration is required, arguably only in one case, *Stofferan v. Depew*, 79 Wash. 170, 139 P. 1084 (1914), did the court squarely hold that new consideration was not required. In *Stofferan*, the court upheld an amended unilateral contract which expanded the obligor's liability. Notwithstanding that the rules expressed in the other cases overruled in *Rosellini* denied the need for new consideration, consideration in fact existed or was not required because of waiver. See *LaPlante v. Hubbard*, 125 Wash. 621, 217 P. 20 (1923); *Dyer v. Middle Kittitas Irrigation Dist.*, 25 Wash. 80, 64 P. 1009 (1901); *Long v. Pierce County*, 22 Wash. 330, 61 P. 142 (1900); *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 P. 1098 (1894); Shattuck, *supra* at 59 n.149. In the two remaining cases overruled in *Rosellini*, consideration, albeit subtle, in fact appeared present. See *Meyer v. Strom*, 37 Wn. 2d 818, 828-29, 226 P.2d 218, 223-24 (1951); *Inman v. Roche Fruit Co.*, 162 Wash. 235, 298 P. 342 (1931). In *Meyer*, the original contract, an equipment lease, provided for rent on a per-hour-of-use basis with no minimum usage. Lessor agreed to reduce the rental rate, possibly as a means of increasing lessee's profits and thereby encouraging increased usage. In *Inman*, a buyer of cherries modified an executory sales contract to assume the burden of sorting, packing and grading. Thus it increased its control over product quality "to the satisfaction of [the buyer] and its trade." 162 Wash. at 237, 298 P. at 342. *But cf.* Shattuck, *supra* at 59, 62.

I. THE DOCTRINE OF CONSIDERATION IN CONTRACT MODIFICATIONS

The common law doctrine of consideration, not found in other legal systems,⁵ has a controversial early history,⁶ and has in modern times been the subject of scholarly attack⁷ and concerted criticism.⁸ However, the doctrine has its defenders⁹ and serves both formal and substantive functions. The formal functions traditionally attributed to the element of consideration are:¹⁰ (1) evidentiary—to provide evi-

5. See Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825 (1941); von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959) (The author notes, *id.* at 1069, that "French and German law approach unfair exchanges . . . directly through rules of duress and economic duress."); Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract*, 17 INT'L & COMP. L.Q. 137, 145-58 (1968).

6. It is submitted that accounts of the history of the doctrine of consideration are colored by the historian's view of the doctrine's worth. See, e.g., Brody, *An Exercise in Sociological Jurisprudence: Herein the Signal Theory*, 20 DEPAUL L. REV. 791 (1971). Brody believes the needs of early English society were fulfilled by the successive development of the common law writs such as detinue, covenant and debt. The concept of consideration evolved with the development of assumpsit in the 15th and 16th centuries, and Brody suggests that, because no new writs have evolved since then, the doctrine of consideration must be effectively adapting to the needs of society. *Id.* at 832. Another writer, viewing the doctrine much more critically, suggests that "the word 'consideration' . . . came to be used as a word of art to express the sum of the conditions necessary for an action in assumpsit to lie." Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 598 (1969). Thereafter, an illogical test evolved whereby promises enjoyed the legal sanction of assumpsit if there was "consideration." In other words, the consideration test initially begged the question.

7. See, e.g., Llewellyn, *Common Law Reform of Consideration: Are There Measures?* 41 COLUM. L. REV. 863 (1941); Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941); Mason, *supra* note 5; von Mehren, *supra* note 5; Chloros, *supra* note 5. Two distinguished writers have urged complete replacement of the doctrine with a test which determines whether the promise was made with intent to contract. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 646 (1919); Wright, *Ought the Doctrine of Consideration Be Abolished from the Common Law?* 49 HARV. L. REV. 1225, 1251 (1936).

8. In Britain, the Lord Chancellor's Law Revision Committee found the doctrine of consideration to be generally outdated and unsatisfactory. LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, CMD. No. 5449 (1937). Its sweeping proposals for legislative reform of the doctrine were not implemented, however, and the report has drawn much criticism. See Hamson, *The Reform of Consideration*, 54 L.Q. REV. 233 (1938) (partially supporting the Committee's recommendations); Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289, 324-28 (1954); Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 853-62 (1941).

Various proposals of the New York Law Revision Commission concerning the doctrine are discussed in Hays, *supra*.

9. See Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958); Brody, *supra* note 6; Shatwell, *supra* note 8.

10. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-03 (1941).

dence of the “existence and purport”¹¹ of the contract; (2) cautionary—to prevent inconsiderate engagements; and (3) channeling—to provide the parties a means of signaling to a court that the agreement is a contract. In other words, by “channeling” their behavior in a legally recognized manner, *i.e.*, by including consideration in their agreement, parties may be more certain they have created an enforceable agreement. In its substantive function, the doctrine of consideration examines whether the parties have bargained, a process traditionally esteemed in our society,¹² and possibly whether the parties have made an exchange.¹³

The consideration requirement remains a cornerstone of contract law. Nevertheless, its firm entrenchment has been eroded in specific areas¹⁴ and even those who defend¹⁵ or accept¹⁶ the doctrine acknowledge it has certain weaknesses, among which is its operation in contract modification situations.¹⁷

A. *The Functional Usefulness of the New Consideration Rule*

Requirement of new consideration to support a contract modification should be imposed only if functionally useful. It is submitted that

11. *Id.* at 800, quoting Austin, *Fragments—On Contracts*, in 2 LECTURES ON JURISPRUDENCE 940 (4th ed. R. Campbell 1879).

12. See RESTATEMENT (SECOND) OF CONTRACTS § 76, comment *b* (Tent. Draft No. 2, 1965) [hereinafter cited as REST. 2D]; Patterson, *supra* note 9, at 945.

13. It is not clear that the exchange element is required. See notes 23–24 and accompanying text *infra*. The notion that consideration involves bargained-for exchange, as expressed in REST. 2D § 75, is probably related to the *quid pro quo* of debt and *indebitatus assumpsit*. See Farnsworth, *supra* note 6, at 598. But see C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 398 (1949).

14. The expansion of RESTATEMENT OF CONTRACTS § 90 exemplifies the piecemeal reform of the doctrine of consideration. See, *e.g.*, Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965); Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (Traynor, J.) (expanding use of § 90 beyond the bounds of the gratuitous promise and into the realm of offer for a bilateral contract). *Contra*, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933) (L. Hand, J.). Compare RESTATEMENT OF CONTRACTS § 90 (1932), with REST. 2D § 90 (note especially comment *e* at 170). See also Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 606–07 (1969); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

Section 90 of the original Restatement has been accepted in Washington. See, *e.g.*, Corbit v. J.I. Case Co., 70 Wn. 2d 522, 538–40, 424 P.2d 290, 300–01 (1967). However, the Washington court has not yet accepted REST. 2D § 90.

15. See Patterson, *supra* note 9, at 935–41.

16. See Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 742 (1931).

17. *Id.* at 742; Patterson, *supra* note 9, at 936–38.

the new consideration requirement serves little if any function when an existing contract is modified and therefore should not be imposed. Two of the formal functions of consideration, evidentiary and cautionary, can be satisfied without requiring new consideration in the modification situation. Consider first the evidentiary function.

Some commentators have argued that the ingredient of mutual consideration provides "evidence of the existence and purport of the contract, in case of controversy,"¹⁸ and helps insure genuineness and expose fabrication of a contract.¹⁹ However, the genuineness and terms of a contract are best substantiated by more trustworthy forms of evidence such as writings or testimony. Surely a fabricated contract may easily include fictitious consideration flowing both ways. One who would falsely claim the existence of a contract will not hesitate to add a lie that he or she has delivered consideration. Thus, it is submitted that the traditional explanations of the evidentiary function of consideration do not withstand close analysis. Mutual consideration is evidence not of "existence and purport," but of *bargaining*. As will be suggested, the peculiar setting of a contract modification obviates the need for new consideration as evidence of bargaining.²⁰

The cautionary function of consideration is satisfied in a modification agreement by the pre-existing contractual relationship. The giving of consideration in the original contract guarded against ill-considered action in establishing the contractual relationship; there is little need for the parties to be further cautioned of the seriousness of their affairs at the modification stage. Having bargained into a contract creating rights and duties of some precision, it is unlikely that a party will increase duties or decrease rights without due care.

In contrast to the evidentiary and cautionary functions of consideration, the channeling function does not seem to serve the needs of most parties to agreements, whether they be original agreements or modifications. The consideration signal produced by a party of superior bargaining power can be a smokescreen for overreaching, often accepted by courts as conclusive proof that the agreement should be

18. Fuller, *supra* note 10, at 800, quoting Austin, *Fragments—On Contracts*, in 2 LECTURES ON JURISPRUDENCE 940 (4th ed. R. Campbell 1879).

19. Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 613 (1930).

20. See paragraph in text containing notes 23–24 *infra*.

enforced.²¹ Thus, the channeling function provides strong parties with a mechanical means of signaling to a court that there is a contract, and it provides courts with a mechanical basis for upholding the agreement. If no new consideration is required to enforce a modification agreement, a technical consideration signal will no longer be available to overreaching parties, nor will it prompt courts unquestioningly to enforce the agreement. This means that the enforceability of the agreement will be somewhat less certain.²² But the slight erosion of security of contract will be far outweighed by the fact that the courts will not be swayed by a meaningless consideration signal, and will properly focus on the more cogent inquiry, *i.e.*, whether the agreement and the surrounding circumstances constitute over-reaching.

Conversely, where a modification is basically fair, but where the parties fail to include the consideration signal, the courts will not feel compelled to deny the modification simply for lack of the magic ingredient. For example, where unforeseen circumstances inhibit performance of an original contract, the parties may reasonably agree on a higher price for the same, but now more burdensome, performance. Under the new consideration rule, if the parties in this situation are sophisticated or advised by counsel, they can effect an ironclad modification contract by executing a written rescission of the old contract and by then creating a novation to suit their desires. Less sophisticated parties in the same situation, unaware of the channeling formula, might simply agree to the higher price—an ineffectual agreement under the new consideration rule. Thus, the rule may be a trap for the unwary; expectations of such parties are better protected by elimination of a new consideration requirement.

The substantive function of the doctrine of consideration requires that the agreement result from bargaining, although it is not clear that there must be an exchange.²³ Professor Edwin W. Patterson suggests

21. See, *e.g.*, *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. 1949); *Meyer v. Eschback*, 192 Wash. 310, 73 P.2d 803 (1937). Karl Llewellyn, however, has suggested that courts strain to ignore mere technical consideration when an agreement is lopsided. Llewellyn, *supra* note 7, at 865–66. Thus, the channeling function may mislead parties to focus on the inclusion of consideration rather than on the fairness of the agreement.

22. See Patterson, *supra* note 9, at 937 (suggesting, however, that the exceptions the new consideration rule detract from its certainty).

23. A requirement of exchange has been attributed to the doctrine of consideration probably because it theoretically serves to screen and deny enforcement to unfair agree-

that the doctrine, in light of its historical origin and development, requires not a simultaneous exchange, but only that the agreement must have been bargained-for.²⁴ By the time a contract is modified, however, an initial bargaining relationship has been established by virtue of the presumably valid original contract. It should be presumed that the initial bargaining relationship did not change and that it existed at the time of the modification. This presumption would eliminate the need for the proponent of the modification to show new consideration as evidence of bargaining. It then would fall to the party denying the modification to produce evidence of lack of bargaining.

Of course, a court should scrutinize the modification for duress, fraud, mistake and lack of good faith. At this point, the presence or absence of a valid business purpose for the modification becomes important. A demand for modification asserted without reasonable explanation, such as unforeseen circumstances,²⁵ may suggest, but does not compel, a finding of coercion. On the other hand, the good faith of the modification does not necessarily follow from a finding that there is a business purpose or that there was new consideration, especially where the consideration is technical.

ments. Compare *Wickham & Burton Coal Co. v. Farmer's Lumber Co.*, 189 Iowa 1183, 179 N.W. 417 (1920), with *McMichael v. Price*, 177 Okla. 186, 58 P.2d 549 (1936). However, the rule that adequacy of the consideration will not be considered diminishes this protection. See, e.g., *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. 1949); *Meyer v. Eschback*, 192 Wash. 310, 73 P.2d 803 (1937). Because the doctrine of consideration parades as a test for unfairness, other more appropriate protective doctrines such as duress, fraud and mistake go undeveloped. Von Mehren, *supra* note 5, at 1075. Sharp notes:

Much of the work that is now being done by doctrines of consideration could be handled more discriminately and systematically by notions of duress, fraud, mistake, supervening difficulty, forfeiture, or more general and less easily defined notions of public policy.

Sharp, *supra* note 7, at 796.

24. *Patterson*, *supra* note 9, at 932-34. The bargaining requirement does not mean that the parties must necessarily have negotiated or haggled; rather the doctrine of consideration requires "bargaining" in the sense that each party is acting out of self interest without substantial donative intent. See *REST. 2D* § 75, comment *b*, at 5. Of course, it is sometimes difficult to distinguish "bargained-for exchange" from a conditional gratuitous promise; the issue may turn on surrounding circumstances. See J. MURRAY, *CONTRACTS* § 79 (2d rev. ed. 1974).

25. The "unforeseen circumstances" need not be so severe as to allow a party to avoid the original contract under the doctrines of impossibility of performance or frustration of purpose. Where these doctrines apply, even under a new consideration rule, a modification to accommodate the new situation may be upheld even though the original contract is altered on one side only, because the promisee surrenders the right to cease performance under the original contract. See *Pittsburg Testing Laboratory v. Farnsworth & Chambers Co.*, 251 F.2d 77, 79 (10th Cir. 1958); *Blakeslee v. Board of Water*

B. The Trend Away From Requiring New Consideration

Recent legislation suggests a trend away from the new consideration requirement in modification situations, prompted, apparently, by an increased recognition that the requirement serves little purpose when an existing contract is modified.²⁶ Legislation in several states has eliminated the requirement if the modification is in writing.²⁷ More significantly, Section 2-209(1) of the Uniform Commercial Code (UCC) has been widely adopted.²⁸ It provides that "[a]n agreement modifying a contract within [Article 2] needs no consideration to be binding."²⁹ The UCC's departure from the common law rule for

Comm'rs, 106 Conn. 642, 139 A. 106, 111 (1927). The Massachusetts court has even found "consideration" if there are no unusual circumstances and the promisee simply refrains from exercising the power to breach the original contract. *See, e.g., Swartz v. Lieberman*, 323 Mass. 109, 80 N.E.2d 5 (1948); *Torrey v. Adams*, 254 Mass. 22, 149 N.E. 618 (1925). These factual circumstances obviously involve some danger of coercion. Cf. 1A A. CORBIN, CONTRACTS § 182 (1963).

26. *See* W. HAWKLAND, SALES AND BULK SALES 11 (1958), in which the author states: "Most modifications of sales contracts run afoul of the pre-existing duty rule, but there have been growing doubts as to the soundness and social wisdom of that rule"

27. *E.g.*, N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1964); CAL. CIV. CODE §§ 1697-98 (West 1973); MICH. STAT. ANN. § 26.978(1) (1970); S.D. COMP. LAWS ANN. §§ 53-8-6, -7 (1967); PA. STAT. ANN. tit. 33, § 6 (1967); N.D. CENT. CODE §§ 9-09-05, -06 (1959). By implication, oral modifications require consideration and thus these statutes do not go as far as the Uniform Commercial Code. *See* note 29 *infra*.

28. Section 2-209(1) has been enacted in every state except Louisiana. 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-209:2 (2d ed. 1970, Supp. 1974).

29. UCC § 2-209(1). The *raison d'être* of § 2-209(1), as suggested in Comment 1, is "to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments." Dean Hawkland has written:

Section 2-209 ends the speciousness of pretending the pre-existing duty rule is consistently in force in states in which able judges long have been evading it, and it brings sense to the law of those states which have steadfastly clung to [the] . . . rule.

W. HAWKLAND, *supra* note 26, at 11.

Section 2-209 imposes formal requirements in some instances. Although an oral modification without consideration may be effective, a writing is required if the contract as modified is within the Statute of Frauds. *Id.* § 2-209(3). For various interpretations of § 2-209(3), see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 38 (1972). A signed writing is also required for modification or rescission if the parties' written contract so provides. In that case a nonmerchant is not legally bound by the terms of a modification or rescission provision presented by a merchant unless the nonmerchant signs the provision separately. UCC § 2-209(2).

Section 2-209 does not by itself prevent oppressive or coerced modifications, except to the extent the formal requirements function as safeguards. However, Comment 2 to § 2-209 provides that modifications must meet the UCC's good faith requirement and that, regardless of the presence of technical consideration, if there is no "legitimate commercial reason" for the modification it may be ineffective. The implications of the UCC's good faith requirement are discussed in Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L.

sales contracts signals a need to reexamine the new consideration requirement in modifications of contracts not within its purview.³⁰

The trend away from the requirement of new consideration is further evidenced by new Section 89D(a) of the second Restatement of Contracts which recognizes that "[a] promise modifying a duty under a contract not fully performed on either side is binding . . . if the modification is fair and equitable in view of circumstances not anticipated when the contract was made"³¹ Finally, although courts

REV. 666 (1963). Definition of "legitimate commercial reason" has been left to the courts. Unforeseen circumstances sufficient to legally excuse performance are not required, however. UCC § 2-209, Comment 2; see W. HAWKLAND, *supra* note 26, at 12-13.

Other sections of the UCC may be used to disallow unfair modifications. See § 1-203 (imposes obligation of "good faith" as defined in §§ 1-201(19), 2-103(1)(b); § 1-103 (allows common law doctrines of fraud, duress, mistake, and so forth, to be applied); § 2-302 (prohibits unconscionable agreements). For discussion of how the UCC may protect against modifications made by the "extortionist," the "profiteer," "the chiseler" and the "dishonest compromiser," see J. WHITE & R. SUMMERS, *supra* at 40-41.

30. "It would probably be accepted as an undisputed proposition of . . . American law that statutes are not extended by analogy." Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 226 (1917); see Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908). However, some authorities have suggested that statutes should be viewed as a source of principle for the development of the common law. See, e.g., Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-15 (1936); Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934). And there is judicial precedent for extending Article 2 of the UCC to nonsales situations:

[Code provisions] which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship.

Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 822 n.9 (3d Cir. 1951).

31. REST. 2D § 89D(a). Comment *a* to § 89D seems to recognize a presumption of bargain in adjustments to ongoing transactions. Comment *b* to § 89D gives body to the language, "circumstances not anticipated when the contract was made"; "[A] frustrating event may be unanticipated for this purpose if it was not adequately covered, even though it was foreseen as a remote possibility." (Emphasis added.) Thus, it appears the "circumstances not anticipated" need not be such as would relieve the party from performing the contract in law or in equity. Illustration 4 indicates that even a modification in response to a market shift may be binding. By virtue of Illustration 4, § 89D(a) seems as liberal as UCC § 2-209, where Comment 2 provides: "[A] market shift which makes performance come to involve a loss may provide [sufficient reason for a modification agreement]." However, Illustration 4 seems to contain an element of reliance or estoppel, which may prevent its liberal application. Even so, the Reporter's Note to § 89D cites for support *Swartz v. Lieberman*, 323 Mass. 109, 80 N.E.2d 5 (1948), in which the court disclaimed reliance on estoppel. It is surprising that *Swartz* is cited because it is typical of the line of Massachusetts cases which allow enforcement of a modification under circumstances which could involve coercion. See note 25 *supra*.

Finally, the occurrence of "circumstances not anticipated" satisfies the Comment *b* requirement of "an objectively demonstrable reason for seeking a modification." REST. 2D § 89D, Comment *b*. Note the identical phrase appears in UCC § 2-209, Comment 2. Section 2-209, however, only requires an "objectively demonstrable reason" in "some

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have not expressly eliminated the consideration requirement, some have evaded the rule by means of implied waiver³² or the favorite, implied rescission.³³

In adopting the rule that new consideration is needed to support modification of an existing contract, the *Rosellini* court failed to recognize that consideration serves little functional purpose and that the doctrine, as it applies to modification, has been severely eroded not only in the courts but in the UCC, similar statutes and the second Restatement as well. The court seems simply to have weighed the Washington case authority, and unfortunately chose to go no further.

situations," and perhaps only where there are dealings between merchants. See UCC § 2-209, Comment 2.

32. See, e.g., *Owens v. City of Bartlett*, —Kan.—, 528 P.2d 1235, 1241-42 (1974). The new consideration rule has also been avoided by use of "gift" reasoning. See *Watkins & Son, Inc. v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941), in which the "gift" was undoubtedly a fiction for lack of donative intent. The court, however, creatively satisfied the requirement of delivery by ignoring a promise to pay more and finding a (delivered) release of the contractor's duty to work for less. 21 A.2d at 594.

33. One commentator has suggested that the New York courts have enforced the modification if there is consent between the parties. If the court finds consent, it may avoid the consideration requirement by finding implied rescission. *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887, *reh. denied*, 231 N.Y. 602, 132 N.E. 905 (1921) (basis for REST. 2d § 89D, Illustration 3). The commentator further suggests that the consent test has not been clearly expressed or developed, in part from fear of arousing dissent among proponents of the consideration requirement. Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173, 175-80 (1967).

Although the *Rosellini* court ruled that new consideration is required for contract modification, there is precedent in Washington for upholding modifications on the basis of implied rescission. In *Evans v. Oregon & Wash. R.R.*, 58 Wash. 429, 108 P. 1095 (1910), the court held that a contractor's oral agreement to pay an additional sum to a subcontractor, who had refused to perform and was about to abandon a written contract, was valid. The court reasoned that the contractor could treat the old contract as abrogated and enter into a new, less advantageous contract with the subcontractor. *Id.* at 431-32, 108 P. at 1095-96. Moreover, *Inman v. Roche Fruit Co.*, 162 Wash. 235, 298 P. 342 (1931), a case possibly involving implied rescission, was overruled in *Rosellini* only "[t]o the extent that . . . [it] hold[s] that the original consideration 'attaches to and supports' the modification" 83 Wn. 2d at 273, 517 P.2d at 958. In *Inman*, the party denying the contract modification had initiated the modification which expanded only his own obligation under a fully executory bilateral contract. If *Inman* is viewed as an implied rescission and novation case, it appears to go beyond *Evans*: *Evans* would allow implied rescission *only* where a party yields a position in response to the other party's breach or threat of breach of the original contract; *Inman* would permit rescission where a party yields a position under the original contract in the absence of any such impetus as threatened breach. See Shattuck, *supra* note 4, at 59 n.152. It is submitted that rescission is in fact easier to infer in the latter situation.

Another means of evading the new consideration requirement, seemingly left undisturbed by the *Rosellini* court, is the argument that a subsequent agreement is really not separate from the original contract, but is only an extension or clarification of the original contract terms. See *Pacific Power & Light Co. v. White*, 104 Wash. 528, 177 P. 313 (1918). The *White* court stated the rule that consideration from an original contract

II. THE DOCTRINE OF ECONOMIC DURESS IN WASHINGTON—AN ALTERNATIVE BASIS FOR *ROSELLINI*

As has been suggested, the *Rosellini* court should not have applied the new consideration requirement to the modification agreement in question. The pre-existing contractual relationship between the parties alleviates the need for new consideration. The court's attention should have focused on the circumstances surrounding the modification, *i.e.*, whether there was fraud, duress or lack of good faith. This discussion will concentrate on duress as that appears to have been the alternative basis available for the court's conclusion.

A. *Economic Duress*

The modern doctrine of duress has departed from the early common law requirement that coercion stem from fear of death, great bodily harm or loss of liberty,³⁴ and be sufficient to overcome the will of a person of ordinary firmness.³⁵ Today many courts recognize more subtle forms of pressure and have applied the duress doctrine to cases in which a "victim's" business or economic well-being is threatened.³⁶

supports a modification, a repudiation of the new consideration rule. Yet the *Rosellini* court did not cite *White* among the cases affected by the court's holding.

Of course, in a fact situation such as *Rosellini*, where the subsequent agreement conflicts with the terms of the original contract, the clarification argument cannot be sustained. But where the subsequent agreement merely adds a new term, perhaps one implied under the old contract, it seems reasonable to conclude that the original contract was simply made complete, not altered, by the subsequent agreement.

34. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 254 (1947).

35. *Id.*; *Winget v. Rockwood*, 69 F.2d 326, 329-30 (8th Cir. 1934).

36. The history of the doctrine of duress is discussed in Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345 (1937) (French and German law); Dalzell, *Duress by Economic Pressure I*, 20 N.C.L. REV. 237, 241-43 (1942); Dawson, *supra* note 34 (the most complete review). In brief, 18th-century English law began to recognize that threats or actual trespass against property interests may generate sufficient coercion to support a finding of duress despite the availability of a legal remedy in such situations. If the legal remedy offered inadequate protection there could be duress. In the leading case of *Astley v. Reynolds*, 93 Eng. Rep. 939 (K.B. 1732), the plaintiff, whose goods were wrongfully detained, could have brought an action in trover, yet he was allowed to recover the money extorted from him because he had "such an immediate want of his goods that an action of trover would not do his business" *Id.* at 939. The rationale of *Astley v. Reynolds* "provides the starting point, the central type-case, of economic duress." Dawson, *supra* note 34, at 256.

No universally recognized underlying theory or rationale has emerged from courts which utilize the doctrine of economic duress.³⁷ Under one theory articulated by the courts, the free will theory,³⁸ the defense of duress is available to a party to an agreement who the court finds has acted involuntarily.³⁹

B. *The Uncertain Status of the Free Will Theory in Washington*

The Washington court seemed to adopt the free will theory in 1918 when it first recognized the doctrine of economic duress in *Olympia Brewing Co. v. State*.⁴⁰ In that case the court noted that "payments made to prevent the sacrifice of large capital investments *are not voluntarily made* but are made as the result of compulsion."⁴¹ Although the free will rationale permeates early Washington economic duress law,⁴² later Washington cases departed from the theory to the extent that factors beside the victim's state of mind were considered by the

37. See *Arlington Towers Land Corp. v. John McShain, Inc.*, 150 F. Supp. 904, 914 (D.D.C. 1957).

38. *Winget v. Rockwood*, 69 F.2d 326, 329-30 (8th Cir. 1934); *Wise v. Midtown Motors, Inc.*, 231 Minn. 46, 42 N.W.2d 404, 407-08 (1950); RESTATEMENT OF CONTRACTS § 492 (1932) (qualified by comment *e*).

39. As evidence of whether the victim acted voluntarily (the ultimate issue), courts may consider such factors as the victim's age, state of physical and mental health, the adequacy of alternative legal remedies, and the type of harm threatened. See, e.g., *Winget v. Rockwood*, 69 F.2d 326, 330 (8th Cir. 1934).

In determining whether a victim was deprived of free will, most courts apply a subjective test, although some have used an objective standard which seems quite inconsistent with modern duress law. Compare *Winget v. Rockwood*, *supra*, with *King v. Lewis*, 188 Ga. 594, 4 S.E.2d 464, 467-68 (1939).

40. 102 Wash. 494, 173 P. 430 (1918). The state had compelled a brewing company to pay an entire annual license fee when it was known that Prohibition would come into effect in 6 months. Finding economic duress, the court awarded recovery of one-half the fee to the brewing company.

41. *Id.* at 495, 173 P. at 431 (emphasis added). A claim that the coerced party was seeking to protect a "large capital investment" has been particularly influential with Washington courts. See *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 675, 24 P.2d 82, 83 (1933) (payment made "to prevent the sacrifice of capital investments" [a service station business]); *Johnson v. Townsend & Co.*, 161 Wash. 332, 296 P. 1046 (1931) (unstated amount of corporate stock wrongfully withheld); *Jacobson v. Nicholas*, 155 Wash. 234, 237, 283 P. 684, 685 (1930) (no duress "because [the victim] had made no investment . . ."). Such considerations are probably not departures from the free will theory; the amount of investment at stake is simply evidence which helps resolve the ultimate issue whether the victim was pressured sufficiently to relinquish his free will.

42. E.g., *Johnson v. Townsend & Co.*, 161 Wash. 332, 335, 296 P. 1046, 1047 (1931) ("Payments made under . . . business compulsion, are involuntary payments."); *Schafer v. Giese*, 135 Wash. 464, 467, 238 P. 3, 4-5 (1925) ("A payment under such circumstances is compulsory, not voluntary, and may be recovered . . ."); *Duke v. Force*, 120 Wash. 599, 619-21, 208 P. 67, 74 (1922).

court. For example, the court failed to find duress where the party allegedly perpetrating coercion felt he was pursuing a rightful claim⁴³ or was acting reasonably and with unselfish motives.⁴⁴ Indeed, in *Starks v. Field*,⁴⁵ while purporting to apply the free will rationale, the court refused to find duress where the coercing party simply took advantage of the victim's pecuniary necessities which effectively left the victim little choice. Recently, in *Puget Sound Power & Light Co. v. Shulman*,⁴⁶ the Washington court held that the plaintiff's "desperate financial conditions" will not support duress where the defendant was not responsible for such conditions. Despite the court's apparent departure from the free will theory, its status in Washington is unclear.⁴⁷ Regardless of whether the court would have employed the free will theory in *Rosellini* or departed from the theory to examine defendant Banchemo's state of mind, the result would have been the same since there was no evidence that Banchemo acted other than in his own interests or in good faith.⁴⁸

C. *The Washington Doctrine of Economic Duress as Applied to Rosellini*

Many elements of economic duress were present in *Rosellini*, including the very factors on which the court based its reversal of the

43. See *Emrich v. Gardner & Hitchings, Inc.*, 51 Wn. 2d 528, 320 P.2d 288 (1958). But cf. *Ramp Buildings Corp. v. Northwest Building Co.*, 164 Wash. 603, 4 P.2d 507 (1931).

44. State *ex rel.* *Bradford v. King County*, 197 Wash. 393, 400-01, 85 P.2d 670, 673 (1938), where county employees were threatened with discharge. Such threats may amount to duress. *Wise v. Midtown Motors, Inc.*, 231 Minn. 46, 42 N.W.2d 404, 408 (1950) (citing cases). However, in *Bradford* the supervisor acted in good faith with his employees' interests in mind and this apparently negated duress.

45. 198 Wash. 593, 89 P.2d 513 (1939).

46. 84 Wn. 2d 433, 442-43, 526 P.2d 1210, 1216 (1974).

47. The court has failed to explain the status of the theory. The court's apparent willingness, however, to consider factors other than the victim's state of mind is encouraging because the free will theory does not withstand close scrutiny. Duress victims, as well as parties to contracts free of duress, may be viewed as choosing between alternative evils. It therefore seems impossible to distinguish one situation from the other on the basis of any difference in the freedom of the consent. See Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474-78 (1923); Dalzell, *supra* note 36, at 238-40; Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 615-19 (1943); Dawson, *supra* note 34, at 266-67.

In *Union Pacific R.R. v. Public Service Comm'n*, 248 U.S. 67, 70 (1918), Justice Holmes stated:

It always is for the interest of a party under duress to choose the lesser of two evils.

But the fact that a choice was made according to interest does not exclude duress.

48. See notes 43-44 and accompanying text *supra*; notes 56-59 and accompanying text *infra*.

court of appeals decision, *i.e.*, lack of bona fide dispute and lack of consideration.⁴⁹ In *Rosellini*, coercion stemmed from property owner Banchemo's refusal to pay the due installment.⁵⁰ The refusal to pay occurred at a time when contractor Rosellini needed the money to pay his subcontractors. The subcontractors were demanding payment and prompt payment was probably vital to the continuing goodwill of Rosellini's business. The immediacy of the situation negated the practical efficacy of court action against Banchemo. In short, there was threatened, if not actual, breach of contract for which the remedy at law was inadequate. Other courts have held that such circumstances constitute economic duress.⁵¹

Moreover, not only did Banchemo's threatened breach cause Rosellini's immediate difficulties, but Rosellini's need for money (before the threatened breach) stemmed directly from his performance of the contract with Banchemo and not from some activity unrelated to Banchemo.⁵² A finding of duress in this situation would be consistent with the requirement some courts,⁵³ including Washington,⁵⁴ have imposed that the party accused of coercion must not only have created the immediate pressure on the victim (Banchemo's threatened breach), but must also have caused or contributed to the underlying circumstances (Rosellini's debt to the subcontractors) which led to the victim's vulnerability. In addition, the Washington court sympathizes

49. See *Winget v. Rockwood*, 69 F.2d 326, 331 (8th Cir. 1934) (lack of consideration a factor but not conclusive); *Nixon v. Leitman*, 32 Misc. 2d 461, 464, 466, 224 N.Y.S.2d 448, 451, 453 (Sup. Ct. 1962) (adequacy of consideration belied economic duress).

50. See note 1 and accompanying text *supra*.

51. Where pressure stems from a breach or threat to breach a contract, the availability of legal remedy usually precludes a finding of duress. See, e.g., *Hartsville Oil Mill v. United States*, 271 U.S. 43, 49 (1926); *Tri-State Roofing Co. v. Simon*, 187 Pa. Super. 17, 142 A.2d 333, 335-36 (1958). However, where the legal remedy is inadequate as a practical matter, and substantial injury may immediately result to the threatened party, grounds exist for economic duress. See, e.g., *Wou v. Galbreath-Ruffin Realty Co.*, 22 Misc. 2d 463, 195 N.Y.S.2d 886, 888 (1959); *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921).

52. But see *Rosellini v. Banchemo*, 8 Wn. App. 383, 387, 506 P.2d 866, 868 (1973).

53. E.g., *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957); *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953) ("[T]he mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances.").

54. See *Puget Sound Power & Light Co. v. Shulman*, 84 Wn. 2d. 433, 442-43, 526 P. 2d 1210, 1216 (1974), citing *Rosellini v. Banchemo*, 8 Wn. App. 383, 387, 506 P.2d 866, 869 (1973). Both cases quote *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957); cf. *Starks v. Field*, 198 Wash. 593, 599, 89 P.2d 513, 516 (1939).

where the victim relied on a pre-existing contract with the coercing party.⁵⁵

As discussed above, the court has also shown concern for the state of mind and motives of the party accused of coercion.⁵⁶ In *Rosellini*, it appears Banchemo knew Rosellini needed the installment payment to pay construction obligations.⁵⁷ Not only did the trial court implicitly find that there had been no valid dispute between the parties,⁵⁸ it is doubtful there was even a colorable basis for Banchemo's withholding of the installment payment since the payment would not have put total payments above either the original price or even the modified price. Thus, it seems Banchemo lacked good faith in withholding the installment payment and therefore his state of mind does not negate duress.⁵⁹

Even though it appears economic duress is present in *Rosellini*, the Washington court has recognized that ratification by the victim may negate duress.⁶⁰ There is no indication that Rosellini protested the contract modification either before or within a reasonable time after receipt of payment. This raises the issue whether a failure to protest constitutes ratification of alleged coercion, an issue left unresolved by a series of Washington cases.

In *Olympia Brewing Co. v. State*,⁶¹ a brewing company paid a coerced license fee under protest while various liquor retailers paid their fees without protest. In an action to recover the fees, the court expressly found no distinction between the two types of claims.⁶² However, in *White v. T.W. Little Co.*,⁶³ the court held that rescission

55. *Sunset Copper Co. v. Black*, 115 Wash. 132, 196 P. 640 (1921) (purchaser of mining claims pursuant to a deferred payment contract had made valuable improvements, thus exposing himself to seller's threats of forfeiture).

56. See notes 43-44 and accompanying text *supra*.

57. At the trial Banchemo testified:

Q: And that is what Mr. Rosellini was going to use [the installment payment] for, isn't it, to pay the bills?

A: That's what he did with all of them. I presume, paid all the bills.

Record, King County Superior Court No. 728676, at 96 (Oct. 26, 1971).

58. See note 3 *supra*.

59. See notes 43-44 and accompanying text *supra*.

60. "[A] contract made under duress is not absolutely void, but voidable only. . . . it is susceptible of ratification so as to render it entirely valid thereafter." *Duke v. Force*, 120 Wash. 599, 622, 208 P. 67, 75 (1922), quoting *Brown v. Worthington*, 162 Mo. App. 508, 142 S.W. 1082, 1085 (1912); *Bair v. Spokane Sav. Bank*, 186 Wash. 472, 485, 58 P.2d 819, 825 (1936).

61. 102 Wash. 494, 173 P. 430 (1918).

62. *Id.* at 495, 173 P. at 431.

63. 118 Wash. 582, 591, 204 P. 186, 189 (1922). See also *Jacobson v. Nicholas*, 155 Wash. 234, 237, 283 P. 684, 685 (1930).

of a contract signed under duress is not allowed unless protest was made at the time of signing. In *White*, without discussion of policy considerations, the court stated that it had been held that protest is necessary to sustain duress, citing only *Sunset Copper Co. v. Black*.⁶⁴ The court failed to discuss *Olympia Brewing*. Moreover, reliance on *Sunset Copper* for the proposition that protest is required is unwarranted because the victim protested in that case and the court did not reach the issue whether protest was required.

In *Ferguson v. Associated Oil Co.*,⁶⁵ the court, citing *White*, found duress but conditioned recovery on the coerced payments having been made under protest. The court, however, may have believed protest necessary under the circumstances of the case because the legal remedy available to the coerced party was adequate and in fact was eventually employed at a time when the pressure and threat of loss had not diminished. Because the legal remedy was adequate, this case may represent an unsound application of the doctrine of economic duress, regardless of the protest.⁶⁶

In *Union Bag & Paper Corp. v. State*,⁶⁷ the court affirmed the overruling of a demurrer to a plea of duress where the victim had not alleged protest. The court explicitly noted the lack of protest.⁶⁸ Again in *Ramp Buildings Corp. v. Northwest Building Co.*,⁶⁹ protest was not alleged, yet the court held the pleadings were sufficient to sustain a finding of economic duress. *Olympia Brewing* and *Union Bag* may be distinguished from cases involving private parties on the basis that the state is held to a higher standard of fair dealing. The other cases, however, appear irreconcilable. It is submitted that protest should not be a required element of economic duress. The court in *Union Bag* seems correct in stating: "[I]t seems to us that express protest, at the time of payment, is but one class of evidence of the payment being made under coercion."⁷⁰ Each case should turn on its facts. For ex-

64. 115 Wash. 132, 196 P. 640 (1921).

65. 173 Wash. 672, 24 P.2d 82 (1933).

66. See *id.* at 677-78, 24 P.2d at 84 (Steinert, J., dissenting); note 51 and accompanying text *supra*. Williston states: "[I]f a payment is otherwise clearly voluntary, protest will not make it involuntary." 13 S. WILLISTON, CONTRACTS § 1623 (3d ed. W. Jaeger 1970) (citing cases).

67. 160 Wash. 538, 295 P. 748 (1931).

68. *Id.* at 541, 295 P. at 749.

69. 164 Wash. 603, 4 P.2d 507 (1931).

70. 160 Wash. at 545, 295 P. at 750. This rule is also suggested in 13 S. WILLISTON, CONTRACTS § 1623 (3d ed. W. Jaeger 1970).

ample, it would be harsh to require the victim to protest at the time of the coercion while performance due him or her is still executory. Such was the case in *Rosellini*: Although Rosellini received the installment payment when the modification was signed, future payments may have been jeopardized had protest been made at that time. Thus, lack of protest in *Rosellini* should not have been fatal to a finding of economic duress. More importantly, the court could have resolved a nagging conflict in Washington case law.

III. CONCLUSION

It is submitted that although the result in *Rosellini* is correct, the case is weakly reasoned. In its eagerness to resolve the conflict among Washington cases as to whether new consideration is required to support a contract modification, the court erred twice: (1) in embracing the consideration requirement without appreciating that the rule is not only of doubtful utility but has been and is being eroded by statutes and courts in other jurisdictions; and (2) in failing to reach the issue of whether there was economic duress. In so failing, the court missed an excellent opportunity to refine the doctrine of economic duress and to resolve whether protest by the victim is required to sustain economic duress. The court should have based its result in *Rosellini* on the doctrine of economic duress rather than the doctrine of consideration.

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